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August 15, 2006

Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20006

Re: Buffalo Southern Railroad, Inc.--Acquisition and Operation  
Exemption--Line in Croton-on-Hudson, New York  
Finance Docket No. 34903

Dear Secretary Williams:

On behalf of Buffalo Southern Railroad, Inc. ("BSOR"), this will respond to a letter to you dated August 14, 2006 from counsel for the Village of Croton-on-Hudson (the "Village"). For the reasons set forth below, the Village's letter is technically and procedurally deficient. More importantly, however, the substantive relief that the Village seeks is based upon erroneous premises and is completely unjustified. Indeed, it is unfortunate that the Village has forced BSOR and the Board to squander their resources and time by responding to and dealing with the letter, which is merely a transparent attempt to inject the Board into the pending litigation between the Village and BSOR in the United States District Court for the Southern District of New York.

As a threshold matter, it is not clear whether the Village is writing in connection with Finance Docket No. 34905, as indicated in the caption of the letter, or in Finance Docket No. 34903, which is the proceeding in which BSOR filed a notice of exemption and motion to dismiss. Furthermore, it is not clear whether the letter is intended by the Village to be treated as a motion to which a responsive pleading would be appropriate or whether the letter format and time-is-of-the-essence implication are simply meant to enhance the hysterical nature of the letter. In any event, the letter provides no basis for any relief and should be summarily rejected.

The Village disingenuously claims that BSOR "intends to begin operations" in the Village on or about August 15, 2006 "contrary to the decision served by the [Board] on July 3, 2006, which stayed the effective date of the exemption." In its complaint in Finance Docket No. 34905, however, the Village alleges that BSOR began operations in

Croton in March, 2006. Indeed, this allegation is the basis for the claim by the Village that BSOR is operating "illegally".

Contrary to the Village's contention, BSOR is not asking the District Court for authority to begin operations on August 15. In granting BSOR's motion for a preliminary injunction against the Village, the Court has already held that BSOR is operating as a common carrier in Croton. Furthermore, the correspondence enclosed with the Village's letter demonstrates beyond any doubt that BSOR is simply seeking confirmation from the Court that handling certain shipments beginning on or about August 15, 2006 will be consistent with the condition that the Court imposed as part of the preliminary injunction prohibiting the Village from interfering with the rail operations of BSOR in Croton.

The Village claims that BSOR is "seeking to supplant the Board's exclusive and plenary jurisdiction" by asking for authority from the Court to operate over the track in Croton. This argument turns the preliminary injunction on its head. The Village overlooks the fact that it is enjoined from interfering with BSOR's operations at Croton, whether or not, in the words of the Court, those operations are illegal, as alleged by the Village, or beyond the authority of the Board, as contended by BSOR. The Village's argument also ignores the notice and motion to dismiss, which clearly frame the question whether the Board, which admittedly has jurisdiction, has authority or whether such authority has been removed pursuant to 49 U.S.C. 10906.

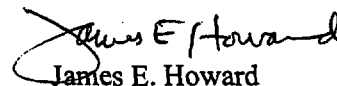
The Village attempts to distort what the Board did in its decision of July 3, 2006 in entering a "housekeeping stay" of the effective date of the notice of exemption. The Village would have the Board "enforce its decision and order BSOR to cease and desist from blatantly disobeying the Board's decision." The Village's argument is presumptuous and completely wrong. It is presumptuous, because, as the Board knows, a housekeeping stay is intended simply "to provide sufficient time for the Board to fully consider the issues presented by the parties." The stay did not address the merits of the notice of exemption or the motion to dismiss or, for that matter, the opposition of the Village to the notice and the motion. All of those issues will presumably be addressed and decided by the Board in due course. Until such time as the issues are decided, there are no decisions to be "enforced" by means of a "cease and desist" order.

In its July 3 decision, the Board noted that in the complaint filed by the Village in Finance Docket No. 34905 the Village had argued that BSOR had not received authority under 49 U.S.C. 10902 to operate as a common carrier in Croton. The Board understood that the complaint requested the Board to order BSOR to cease and desist the "unlawful operations". Consequently, in the complaint the Village has raised, and the Board has recognized, the same issue raised by the notice and motion to dismiss--whether the track in Croton is within 49 U.S.C. 10906 and therefore within the jurisdiction of the Board but outside of its licensing authority. This issue will be decided by the Board, not the District Court, which itself recognized this as an issue for the Board.

The essence of the Village's letter appears to be a request for immediate summary judgment on its complaint in Finance Docket No. 34905, the effect of which would be to eviscerate the District Court's preliminary injunction that precludes the Village from interfering with the rail operations of BSOR. At the risk of stating the obvious, there is no basis for such relief, and the Village's letter should be recognized and rejected for what it is--an unfounded attempt to involve the Board in the litigation in the District Court.

Significantly, the District Court agrees with BSOR. In a letter dated August 14, 2006 from Judge McMahon's clerk, a copy of which is enclosed, the parties were advised that Judge McMahon agrees that the question of the "legality" of BSOR's operations is before the Board and that questions regarding the meaning and scope of the preliminary injunction are before the District Court. Hopefully, with the benefit of this guidance from Judge McMahon and whatever further direction may come from the Board, even the Village will now understand which forum--whether the District Court or the Board--is appropriate for the resolution of any particular issue.

Very truly yours,



James E. Howard

Enclosure

cc: Michael B. Gerrard

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
UNITED STATES COURTHOUSE  
300 QUARROPAS STREET  
WHITE PLAINS, NY 10601  
914-390-4148

CHAMBERS OF  
COLLEEN MCMAHON  
DISTRICT JUDGE

Sent by facsimile:

John T. McMannus  
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90 State Street  
Albany, NY 12207

Michael B. Gerrard  
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399 Park Avenue  
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August 14, 2006

re: Buffalo Southern Railroad Inc. v. Village of Croton-on-Hudson et al.,  
06 Civ. 3755 (CM)

Counsel:

I have spoken to the Judge (who, as you are aware, is currently on vacation) regarding last week's letters to chambers. She has asked me to communicate the following:

It appears that both sides have initiated proceedings before the Surface Transportation Board -- the Railroad through a Notice of Exempt Transaction and the Village through a subsequent Complaint. As you may recall, it was this Court's intention (as stated in its June 12 Opinion) to refer the matter there for resolution of the issue concerning the need for BSOR to obtain a license from the STB before commencing its proposed operations from the Croton Yard, pursuant to the doctrine of primary jurisdiction. It now appears that both parties have adopted the court's point of view.

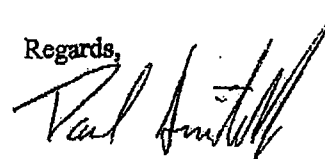
Therefore, were the Judge in chambers, she would not address, under principles of deference, the

issues raised in the Village's letter of August 11 concerning the legality of BSOR's proposed operation as a common carrier from the Site (see discussion of this matter in the Judge's June 12 opinion at pages 15-20). As far as she is concerned, those issues are *pendente lite* before the appropriate agency – the STB – and she awaits the agency's determination.

By contrast, the Judge recognizes that the question of whether BSOR's proposed carriage of gypsum would violate the terms of the June 12 preliminary injunction is the Court's to decide. If it is necessary to obtain an immediate decision, she suggests that you go to Part I, on appropriate papers (not letters), which would include sworn evidence concerning the form in which the gypsum is to be transported. It appears that New York's Environmental Conservation Law governs the issue, and that gypsum in some forms would qualify as solid waste while in other forms it would not so qualify. That is a fact-based inquiry.

Judge McMahon also notes that the carriage of solid waste would appear to violate Judge Nicolai's injunction – an injunction to which Judge McMahon deferred when she made her own preliminary injunction conditional on BSOR's non-carriage of solid waste. See Greentree Realty LLC v. Village of Croton-on-Hudson, No. 11872/05 (Westchester Cty. Sup. Ct. Aug. 25, 2005); Village of Croton-on-Hudson v. Northeast Interchange Ry. LLC, No. 22176/05 (Westchester Cty. Sup. Ct. Apr. 27, 2006). It would probably be most appropriate for the parties to return to the State Supreme Court so that Judge Nicolai could determine whether HIS injunction would be violated by the carriage of gypsum as proposed by BSOR. If HIS injunction would be violated, then Judge McMahon's injunction would also be violated.<sup>1</sup>

Regards,



Paul Serritella  
Law Clerk

BY FAX TO:

Michael B. Gerrard, Esq.  
Arnold & Porter, LLP

John T. McManus, Esq.  
Crane, Parente, Cherubin & Murray

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<sup>1</sup>The Judge realizes BSOR was not a party to the proceedings in state court. However, it is the present sublessee of the Croton Yard, and so would be bound as a privy of Greentree LLC.